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November 23, 2004

VIA ELECTRONIC SUBMISSION

The Honorable Michael K. Powell
Chairman, Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, D.C. 20554

RE: ***Unbundled Access to Network Elements*, WC Docket No. 04-313, *Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 – *Ex Parte***

Dear Chairman Powell:

On November 9, 2004, McLeodUSA Incorporated (McLeod) wrote to urge the Commission to "clarify" that incumbent LECs, like SBC, must provide CLECs unbundled access to next generation, packetized loops to serve business customers. In particular, McLeod claims that the Commission's orders exempting fiber and hybrid loops from unbundling were limited only to "mass market" customers, which, it contends, the Commission now should expressly define as "exclusively residential customers," or "possibly home office business customers."[1] McLeod argues that the Commission should "strictly limit" the mass market to such customers because, it claims, the Commission's primary justification for exempting next generation facilities from unbundling was "the existence of ubiquitous intermodal competition," which, it further asserts, is true only for the mass market, not any category of business customers.[2] McLeod also contends that ILECs need no additional incentives to build out broadband facilities to business customers, and the Commission therefore need not exempt next generation loops for business customers from unbundling to encourage broadband deployment.[3]

On November 9, 2004, SBC filed an *ex parte* responding to virtually identical claims raised by other CLECs,[4] a copy of which is attached. As SBC pointed out, CLEC claims that the Commission required ILECs to unbundle their next generation fiber and hybrid loops to serve business customers are wrong. The Commission has *never* required ILECs to unbundle packetized loops to serve business customers. Contrary to McLeod's claim, the Commission held in the *Triennial Review Order* that ILECs need not unbundle any packetized transmission capability, and it made clear that its decision applied to business, as well as mass

[1] Letter of Chris A. Davis, Chairman and CEO of McLeodUSA Inc., to Hon. Michael K. Powell, Chairman, FCC (filed Nov. 9, 2004). While McLeod does not specifically mention "packet switched" or "packtized" loop transmission capability, the Commission should make no mistake – that is precisely what McLeod is talking about. If the Commission were to limit its exemptions from unbundling for fiber and hybrid loops only to residential customers, it would require ILECs to unbundle all loops (including those using packet switching technology) to serve business customers.

[2] *Id.*

[3] *Id.*

[4] Letter of Christopher M. Heimann, General Attorney, SBC Telecommunications, Inc., to Marlene H. Dortch, Secretary (filed Nov. 9, 2004) (SBC Ex Parte), attached hereto.

market, customers.[5] Nor did the Commission break ground in that regard. Even in the *UNE Remand Order,* which generally adopted overbroad unbundling requirements, the Commission expressly held that CLECs are not impaired in their ability to serve business customers without access to any packet switching capability:

> We decline at this time to unbundle the packet switching functionality, except in limited circumstances. . . . The record demonstrates that competitors are actively deploying facilities used to provide advanced services to serve certain segments of the market – namely, medium and large business – and hence cannot be said to be impaired in their ability to offer service, at least as to these segments without access to the incumbent's facilities.[6]

The Commission further found that, to the extent CLECs might be impaired in their ability to serve residential and small business customers without access to ILEC facilities, which it did not decide, the benefits of unbundling were outweighed by section 706 concerns.[7] The Commission therefore held that ILECs need not unbundle any packet switching technology or capability (except in very limited circumstances not relevant here), and, to prevent any ambiguity regarding the breadth of this holding, specifically excluded the "electronics used for the provision of advanced services" from the definition of the loop – and therefore unbundling.[8] Thus, if McLeod and other CLECs were correct in their reading of those orders, the Commission radically expanded, rather than narrowed, an ILECs' obligation to unbundle broadband by requiring ILECs, for the first time *ever*, to unbundle packetized transmission capability. In light of this Commission's commitment to progressive, deregulatory broadband policies, it is simply inconceivable that the *Triennial Review Order* took the giant step backwards posited by McLeod and other CLECs. Their reading of that order is wrong.

Notwithstanding that the *Triennial Review Order* did not require unbundling of packetized loops in any market segment, CLECs have argued otherwise, not only to this Commission, but in state proceedings as well. If the past is prologue, they will succeed in some of those proceedings, unless the Commission makes clear once and for all that the *Triennial Review Order* did not require ILECs to unbundle packetized loops for use in serving enterprise customers. SBC and BellSouth asked the Commission more than a year ago to so clarify, but those requests have yet to be addressed. It is imperative that the Commission provide the clarification requested in its forthcoming *Triennial Remand Order*. Failure to do so will lead to the very litigation and uncertainty that this Commission, and you in particular, have recognized is so inimical to investment incentives.

The Commission also should reject McLeod's request that the Commission establish new unbundling obligations for packetized transmission facilities in its *Triennial Remand Order*. McLeod's arguments in support of that request are specious. In particular, McLeod is incorrect when it claims that mandatory unbundling of packetized loops to serve enterprise customers will not affect ILEC incentives to invest in broadband. As SBC explained, requiring ILECs to unbundle packetized loops to serve enterprise customers would directly implicate their investment in broadband for *all customers*.[9] First, SBC has not yet deployed broadband facilities to serve all enterprise customers, let alone all customers, and therefore still must invest in new fiber and hybrid loops to meet expanding demand. Requiring SBC to unbundle those facilities would require SBC to bear all the potential risks and socialize all the potential rewards of that investment,

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[5] *Id.* at 2-6.

[6] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3696, para. 306 (1999).

[7] *Id.* at paras. 306-07, 317.

[8] *Id.* at Appendix C, page 3, 47 C.F.R. § 51.319(a)(1).

[9] SBC Ex Parte at 9.

undermining its incentive to invest in next generation facilities. Second, mandatory unbundling would increase the cost of that investment by forcing SBC to design the network to accommodate potential CLEC demand that may never materialize. And, third, when SBC deploys broadband facilities, it does so to reach all customers (not just enterprise or mass market customers) in order to achieve economies of scale and scope. Forced unbundling, even if only to serve enterprise customers, therefore would drive up the cost of deploying those facilities, and thus the cost of providing broadband services to mass market customers.

Likewise, McLeod is simply wrong that the Commission's "primary rationale" for exempting broadband loop facilities from unbundling was "the existence of ubiquitous intermodal competition." Rather, it was that CLECs are not impaired without access to next generation, packetized loops, which is equally true for mass market and enterprise customers.[10] As SBC explained, SBC still must build out its next generation broadband networks to serve mass market and enterprise customers, and, in so doing, confronts the same operational and economic barriers as competing carriers, which actually enjoy certain advantages (such as lower labor costs, and state-of-the-art back office systems and network facilities). McLeod fails to explain how it is impaired without access to facilities that ILECs themselves are only now just deploying. Moreover, requiring ILECs to unbundle next generation loop facilities to serve enterprise customers would make no sense because those are the very customers CLECs are most likely to serve with their own facilities.[11]

In sum, the Commission must continue to reject McLeod's and other CLECs' demands for access to ILEC broadband facilities, even if only to serve so-called "enterprise" customers. Failure to do so not only would reverse longstanding Commission policy, it also would threaten future deployment of broadband, which you rightly have characterized as the central communications policy objective of our day. As you know, SBC has announced that it will invest billions of dollars to extend IP-enabled fiber and hybrid loops deeper into its network, bringing next generation services to millions of customers. That decision was predicated on SBC's understanding that that investment would be exempt from unbundling, and would not be diverted to meet CLEC demands for unbundled access to high capacity loops to serve large business customers. If the Commission were to limit its exemption from unbundling for broadband only to residential customers, as McLeod advocates, the Commission will put that investment at risk by undermining the business case for that investment.

Sincerely,

James C. Smith
Senior Vice President

Attachment

[10] *Id.* at 3-4, 8.

[11] *Id.* at 8-9.

ATTACHMENT

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November 9, 2004

VIA ELECTRONIC SUBMISSION

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 – Ex Parte***

Dear Ms. Dortch:

For the past eight years, the Commission has resisted calls by CLECs and others to regulate broadband services. That hands-off policy has been an unqualified success. Competition and investment in broadband has increased by leaps and bounds. In the eight years since the Telecommunications Act of 1996 was signed into law, broadband availability has gone from virtually zero to over 90 percent of homes in the United States.[1] By mid-2004, 87 percent of homes in the United States had access to cable modem services, over 90 percent had access to satellite broadband services, and over 70 MSAs had access to fixed wireless broadband.[2] In addition, in reliance on the Commission's commitment not to require ILECs to unbundle next generation broadband networks, including fiber transmission facilities, packet switching and the packetized features, functions and capabilities of hybrid loops, ILECs have expended billions of dollars to extend fiber deeper into their networks and deploy packetized transmission capabilities to bring the benefits of broadband to millions of consumers. The end result has been a market characterized by innovation and robust competition, in which ILECs are one of many market players, and a small one at that.[3]

[1] UNE Fact Report 2004 at I-2.

[2] UNE Fact Report 2004 at I-2. Significantly, none of these services relies on ILEC facilities.

[3] According to the Commission's June 2004 *High-Speed Services Report*, a significant majority of consumers obtain broadband service from sources other than wireline providers (which include both CLECs and ILECs). In particular, more than 63 percent of residential and small business customers receiving broadband services of 200 kbps in one direction subscribe to cable modem services, and approximately 85 percent of such customers receiving more than 200 kbps in both directions subscribe to cable modem. *High-Speed Services for Internet Access: Status as of December 31, 2003*, Report, Charts 6 and 8 (FCC, Wireline Competition Bureau June 2004).

Despite the successes of the Commission's broadband policies, CLECs again are clamoring for access to ILEC broadband investment. In particular, CLECs are arguing that the *Triennial Review Order* limited unbundling for packetized hybrid loops, only to the extent such loops were used to serve mass market customers. They argue that the Commission actually required ILECs to provide unbundled access to the packet-switched features, functions and capabilities of their fiber and hybrid fiber loops to CLECs seeking to serve so-called "enterprise" customers,[4] and they ask the Commission to reiterate this requirement.

As shown below, the CLECs are wrong in their interpretation of the *Triennial Review Order*. That order squarely held that ILECs need not provide unbundled access to packetized loops, and it made no distinction between loops serving mass market or enterprise customers.

Nor was that the first time the Commission has so held. Its 1999 *UNE Remand Order* likewise exempted packet switching functionality from unbundling, irrespective of the market served. Indeed, that order expressly found that CLECs are not impaired in their ability to serve *enterprise* customers without access to such functionality:

> We decline at this time to unbundle the packet switching functionality, except in limited circumstances. . . . The record demonstrates that competitors are actively deploying facilities used to provide advanced services to serve certain segments of the market – **namely, medium and large business – and hence they cannot be said to be impaired in their ability to offer service, at least as to these segments without access to the incumbent's facilities**.[5]

Even the 1996 *Local Competition Order* declined to require unbundling of packet switching functionality. The CLECs' interpretation of the *Triennial Review Order* would thus render that order a *retreat* from past deregulatory broadband policies – a retreat that cannot be squared with the Commission's own characterization of that order as deregulatory in nature, much less its text.

The CLECs have offered no credible basis upon which the Commission should or could alter its longstanding policy of not requiring unbundled access to any packetized hybrid loop facilities. Apart from a few bald assertions, they fail to explain how they are impaired without access to facilities that

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[4] Some CLECs may take the Commission's recent description of its broadband unbundling rules to suggest that the Commission is waffling on the meaning of the *Triennial Review Order*. Just two weeks ago, the Commission described the packet switching exemption as applying to the "mass market," without mentioning enterprise customers. *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), et al*., WC Docket No. 01-338, *et al.* FCC 04-254 at para. 6 n. 24 (rel. Oct. 27, 2004) ("The Commission also relieved incumbent LECs from the requirement to unbundle the next generation, packetized capabilities of their hybrid loops for the provision of broadband services to the mass market.") (*271 Broadband Forbearance Order*). CLECs inevitably will seize on the Commission's omission to argue that the Commission's exemption does not apply to loops serving enterprise customers, despite the clear language to the contrary in the *Triennial Review Order*, as discussed below.

[5] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, 15 FCC Rcd 3696, para. 306 (1999) (*UNE Remand Order*) (emphasis added). The Commission found that CLECs "may be impaired" in their ability to serve residential and small business customers without access to ILEC facilities, but concluded that, even if they were (which it did not decide), the benefits of unbundling were outweighed by section 706 concerns.

ILECs themselves are only now just deploying, and they fail to square their request with the critical Commission goal of encouraging new broadband investment, as required by section 706.

This failure is compounded by the fact that the distinction the CLECs would have the Commission draw between enterprise and mass market customers is untenable. When SBC deploys next generation, packetized facilities and equipment necessary to provide broadband services, it deploys facilities that are capable of serving all customers. While eventually those facilities branch out to individual customer premises, the feeder portion of SBC's hybrid loops serve both mass market and enterprise customers. There is thus no way for the Commission to require SBC to unbundle packetized loop facilities that serve enterprise customers, without giving CLECs access to broadband facilities used to serve mass market customers – access that the Commission has recognized need not and should not be required.

Chairman Powell has characterized broadband deployment as "the most central communications policy objective of our day."[6] Now is not the time for the Commission to go wobbly. SBC recently announced that it will invest billions of dollars to extend IP-enabled fiber and hybrid fiber far deeper into its network across SBC's thirteen state region. With this investment, SBC will provide millions of customers with integrated access to high-speed Internet, video and voice services, using a new IP-based fiber network that is distinct from (and provides an array of services that cannot be provided over) SBC's existing network. If the Commission were to require SBC to provide unbundled access to those facilities, even if only to serve enterprise customers, will put that entire investment at risk by undermining the business case for that investment. Even the risk that the Commission might mandate such access would cause SBC to rethink that investment. The Commission therefore must stand firm in its hands-off policy for broadband, and make clear that ILECs have no obligation to unbundle any packetized transmission capability, regardless of whom a CLEC seeks to serve.

I. The *Triennial Review Order* Exempted All Packetized Transmission Capability from Unbundling.

In the *Triennial Review Order*, the Commission held that ILECs need not provide unbundled access to packet switching or any packetized transmission capability because it concluded that the evidence established on a nationwide basis that CLECs are not impaired without access to packet switching (including routers and DSLAMs).[7] In particular, the Commission observed that "a wide range of competitors are actively deploying their own packet switches, including routers and DSLAMs to serve both the enterprise and mass markets, and . . . these facilities are much cheaper to deploy than circuit switches."[8] The Commission also found that requiring ILECs to provide unbundled access to packet technology or any "transmission path . . . used to transmit packetized information" would "blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized by section 706."[9] Accordingly, the Commission exempted ILECs from any obligation to

[6] *271 Broadband Forbearance Order*, Statement of Chairman Michael K. Powell.

[7] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, at para. 537 (2003) (*Triennial Review Order*), subsequent history omitted.

[8] *Id.* at para. 538.

[9] *Triennial Review Order* at para. 288.

unbundle any packet switched technology or functionality in the loop,[10] and limited unbundling of hybrid fiber loops only to the non-packetized TDM capabilities of such loops, where those capabilities already are deployed.[11]

Moreover, the Commission made clear that the exemption from unbundling for packet switching capability was unqualified, with no exceptions. Specifically, the Commission rejected CLEC claims that it should retain a limited exception to the packet switching unbundling exemption in certain circumstances where the ILEC has deployed digital loop carrier systems (as it had in the *UNE Remand Order*),[12] holding in terms that could not be clearer, "we decline to permit *any limited exceptions* to our decision not to unbundle packet switching."[13]

Nevertheless, several CLECs have asserted that the Commission's exemption from unbundling for packet switching capability in the *Triennial Review Order* applies only to mass market customers and that ILECs were required to provide unbundled access to DS1 and DS3 loops using packet switched technology for enterprise customers.[14] Moreover, these and other CLECs have urged the Commission, in the *Triennial Review Remand* proceeding, to continue to require ILECs to unbundle high capacity loops, "regardless of technology,"[15] or, in other words, even if such loops employ packetized transmission capability. Covad even goes so far as to state expressly that the Commission should reinstate access to hybrid fiber loops, including associated packet switching functions.[16]

While, as discussed below, these CLECs' claims are specious, it is critical that the Commission, once and for all, put these arguments to bed so as to foster the kind of certainty the Commission has recognized is essential to promote risky new investment. To that end, the Commission must clearly and

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[10] *Id.* at paras. 537, 288.

[11] *Id.* at paras. 291, 294.

[12] *UNE Remand Order*, Appendix C at 6; 47 C.F.R. § 51.319(c)(3).

[13] *Triennial Review Order* at para. 540 (emphasis added); *see also id.* at para. 7 ("The Order eliminates the current limited requirement for unbundling of packet switching.").

[14] *See* Opposition of AT&T to BellSouth's Petition for Clarification and/or Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147, at 5 (filed Nov. 6, 2003) (AT&T Opposition); Opposition of NewSouth to BellSouth's Petition for Clarification and/or Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147, at 7 (filed Nov. 6, 2003) (NewSouth Opposition); Opposition of Sprint to BellSouth's Petition for Clarification and/or Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147, at 17 (filed Nov. 6, 2003) (Sprint Opposition). *See also* Letter of William H. Courter, McLeodUSA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-313, 02-52 (filed Sept. 29, 2004) (urging the Commission "to ensure at a minimum that competitors continue to receive DS0/DS1 TDM equivalence if a Bell company chooses to install packet switching equipment") (McLeodUSA Ex Parte); Letter of Brad Mutschelknaus on behalf of the Loop and Transport Coalition, Attachment, Loop and Transport Coalition TRO Remand Presentation at 2, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313 (filed Oct. 18, 2004) (arguing that the FCC should ensure that "business customers will not lose access to DS1 capabilities from their provider of choice, regardless of network technology that an ILEC chooses to deploy") (Loop and Transport Coalition Ex Parte).

[15] *See* McLeodUSA Ex Parte; Loop and Transport Coalition Ex Parte at 2.

[16] Reply Comments of Covad, WC Docket No. 04-313, at 14 (filed Oct. 19, 2004).

unequivocally reiterate that ILECs are not required to unbundle any packet technology, including any transmission path used to transmit packetized information.

A. The Triennial Review Order created no exception to the exemption from unbundling for packetized transmission capability.

Arguments that the *Triennial Review Order* actually requires unbundling of packetized DS1 and DS3 loops to enterprise customers are just plain wrong. In the packet switching section of the *Triennial Review Order*, the Commission expressly concluded, "we decline to unbundle packet switching as a stand-alone network element."[17] There is no equivocation in this statement, no qualifications or exceptions. .

Despite the unequivocal nature of the Commission's holding, CLECs maintain that the holding is, in fact, quite limited. Seizing, first, upon the fact that the Commission set forth its impairment analysis for packetized loops in the mass market section of the order, they maintain that the Commission's decision not to unbundle any packet switched loops was limited only to "mass market loops." Packetized DS1 and DS3 loops used for enterprise customers, they maintain, must be unbundled. CLECs also rely on footnote 956 of the order, which, they contend, requires ILECs to provide DS1 and DS3 loops "regardless of the technology used to provide such loops."

These claims cannot be reconciled with the plain language of the Commission's order. The Commission made clear that its separate discussions of enterprise and mass market customers in the loop sections of the order were merely a matter of analytical *convenience*, reflecting the fact that customers associated with each class generally use different types of loops.[18] The Commission expressly stated that it was not thereby creating customer-based distinctions in its loop unbundling rules: "While we adopt loop unbundling rules specific to each loop type, ***our unbundling obligations and limitations for such loops do not vary based on the customer to be served***."[19] Moreover, consistent with the text of the Commission's order, the loop unbundling rules themselves make no customer-based distinctions. Thus, the Commission's limitations on loop unbundling, including its determination ILECs need not unbundle packet switched DS1s and DS3s, apply irrespective of the customer served. In the face of this clear and explicit holding, the CLECs' purported reliance on vague language in footnote 956 is wholly unavailing.

The CLECs' claims that the Commission's relief from unbundling for packet switched DS1 and DS3 loops in the hybrid loop rules is limited only to mass market customers also is belied by the Commission's observation that such loops are purchased by enterprise, not mass market, customers. In explaining the market classifications it adopted for analytical purposes, the Commission stated that mass market (residential and small business) customers typically purchase "analog loops, DS0 loops or loops using xDSL-based technologies," which the Commission said it would address "as part of [its] mass

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[17] *Triennial Review Order* ¶ 537. *See also id.* ¶ 7 ("Incumbent LECs are not required to unbundle packet switching[.] . . . The Order eliminates the current limited requirement for unbundling of packet switching.")

[18] *Triennial Review Order* ¶¶ 209 and 210 (noting that "customers associated with the mass market typically use different types of loop facilities than customers generally associated with the enterprise market," and that "our market classifications allow us to conduct our impairment analyses for various loop *types* at a granular level") (emphasis added).

[19] *Id.* ¶ 210 (further noting that "a competitive LEC faces the same economic considerations in provisioning a DS1 loop to a large business customer typically associated with the enterprise market that it faces in provisioning that same loop to a very small business or residential customer typically associated with the mass market").

market analysis."[20] The Commission found that "enterprise" customers, in contrast, typically purchase "high capacity loops, such as ***DS1, DS3***, and OCn capacity loops," which the Commission said it would address "as part of [its] enterprise market analysis."[21] Plainly, the Commission would not have engaged in an extensive analysis of whether ILECs should be required to unbundle packet switched DS1 and DS3 hybrid loops for mass market customers when it concluded that such customers do not purchase DS1 and DS3 loops in any event. Nor could the Commission have proudly proclaimed, as it did, that the order "eliminate[s] most unbundling requirements for broadband"[22] if the relief given were as hollow as the CLECs would have it.

B. Under the CLECs' reading, the Triennial Review Order substantially expanded, rather than narrowed, ILECs' obligation to unbundle broadband.

The CLECs' argument is not only inconsistent with the express language of the *Triennial Review Order* but also with the Commission's stated intent to establish a deregulatory unbundling regime for broadband in that order. Indeed, if the CLECs' reading of the *Triennial Review Order* were correct, that order radically departed from the Commission's longstanding hands-off approach to broadband by requiring, for the first time, that ILEC's unbundle packetized transmission capability. Even in the early days of implementing the 1996 Act, when it embraced the belief that "more unbundling is better," and required blanket access to ILEC networks on an unrestricted basis, the Commission did not require ILECs to unbundle packet switching capability. To the contrary, in the 1996 *Local Competition Order*, when the Commission ordered blanket unbundling of virtually every component of ILEC networks, it carved out a single exception – for packet switching. The Commission found that the record was insufficient to support unbundling of packet switching capability, and therefore rejected AT&T's and MCI's request that the Commission identify ILEC packet switching as a network element.[23]

Three years later, in the *UNE Remand Order*, the Commission again rejected CLEC demands for access to ILEC investment in broadband.[24] In particular, the Commission found that CLECs were "actively deploying facilities used to provide advanced services to serve certain segments of the market – ***namely, medium and large business*** [*i.e.*, the enterprise market] – and hence [could not] be said to be impaired in their ability to offer service, ***at least as to these segments*** without access to the incumbent's facilities.[25] As to residential and small business (*i.e.*, mass market customers), the Commission concluded that CLECs might be impaired without access to ILEC facilities (the Commission did not decide the issue), but nevertheless concluded that it should not require ILECs to unbundle "packet switching functionality," except in limited circumstances.[26] The Commission reasoned that ILECs and CLECs both were in the early stages of packet switch deployment, and thus faced comparable costs and risks in

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[20] *Id.* ¶ 209.

[21] *Id.* (emphasis added).

[22] *Id.* ¶ 4.

[23] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499, 15713, para. 427 (1996) (*Local Competition Order*), subsequent history omitted.

[24] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3696, paras. 300-17 (1999) (*UNE Remand Order*).

[25] *Id.* at para. 306.

[26] *Id.*

deploying packet switching functionality.[27] The Commission also expressed concern that regulatory action might "alter the successful deployment of advanced services that [had] occurred to date," and "stifle burgeoning competition in the advanced services market," contrary to the goals of section 706.[28] The Commission therefore declined to require unbundling of any packet switching technology or capability, except in limited circumstances.[29] The Commission defined "packet switching" as including, specifically "frame relay" at "capacities ranging from DS0 to DS3,"[30] and, more generally, "the basic packet switching function of routing or forwarding packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells or other data units, and the functions that are performed by Digital Subscriber Line Access Multiplexers."[31] And lest there be any ambiguity regarding the breadth of its exemption from unbundling for packet switching capability, the Commission specifically excluded the "electronics used for the provision of advanced services" from the definition of the loop – and therefore from unbundling.[32]

In their separate statements regarding the *Triennial Review Order*, Chairman Powell and Commissioners Abernathy and Martin asserted that the order took bold steps to stimulate investment in next generation networks by sweeping away unbundling obligations that create unwarranted obstacles to the deployment of broadband infrastructure and services.[33] But if ILECs must provide CLECs access to any packet switched transmission facilities to serve enterprise customers, the *Triennial Review Order* substantially expands, rather than narrows, an ILEC's obligation to unbundle broadband facilities because, under the *UNE Remand Order*, ILECs were required to provide unbundled access to packet switched loops only in certain, quite narrow circumstances (*i.e.*, where an ILEC had deployed a packet switched IDLC system, and did not allow CLECs to collocate a DSLAM at the ILEC's remote terminal or provide a spare copper loop). [34] In light of the Chairman's and Commissioners' statements to the contrary, and the Commission's clear statement that "[t]he Order eliminates the current limited requirement for unbundling of packet switching,"[35] the CLECs' argument that the *Triennial Review Order*

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[27] *Id.* at para. 308.

[28] *Id.* at para. 316-17.

[29] In particular, the Commission required ILECs to provide access to unbundled packet switching capability only where each of the following conditions were met: (1) the ILEC had deployed DLC systems; (2) there were no spare copper loops capable of supporting xDSL services; (3) the ILEC did not permit a CLEC to collocate a DSLAM at the remote terminal; and (4) the ILEC had deployed packet switching capability for its own use. 47 C.F.R. § 51.319(c)(3).

[30] *Id.* at para. 311-12.

[31] *Id.* at Appendix C, page 6; 47 C.F.R. § 51.319(c)(3).

[32] 47 C.F.R. § 51.319(a)(1).

[33] *See Separate Statement of Chairman Michael J. Powell* at 1; *Separate Statement of Commissioner Kathleen Q. Abernathy* at 1 ("I strongly support the decision to create a national policy that exempts new broadband investment from unbundling at deeply discounted TELRIC rates."); and *Commissioner Kevin J. Martin's Press Statement on the Triennial Review* at 2 (noting that the order "provides sweeping regulatory relief for broadband and new investments," including deregulating "any fiber used with new packet technology").

[34] *UNE Remand Order*, Appendix C at 6.

[35] *Triennial Review Order* at para. 7.

expanded the unbundling requirements for broadband by requiring ILECs to unbundle packetized DS1s and DS3s for enterprise customers is simply untenable, and the Commission should so hold

II. CLEC Claims of Impairment Are Meritless.

Just as CLECs are wrong in their characterization of what the Commission *has held* with respect to packetized transmission facilities, so too are they wrong in their quest for future unbundling obligations for such facilities. CLECs argue that they are impaired without access to next generation packetized loops due to ILEC advantages of incumbency (such as ubiquitous plant and an existing customer base). In making this argument, however, the CLECs would have the Commission believe that the impairment analysis for packetized equivalents to DS1s and DS3s is no different from the impairment analysis for TDM-based DS1s and DS3s. But, that simply is not the case. Even if the Commission were to conclude that CLECs are impaired without unbundled access to TDM-based DS1 and DS3 loops (and, for the reasons set forth in SBC's comments and reply comments in this proceeding, the Commission should not), any such conclusion would have no bearing on whether packetized transmission facilities should be unbundled because the circumstances are so radically different.

While TDM-based DS1s and DS3s already have been widely deployed in SBC's network, SBC has not yet deployed next generation broadband networks (including fiber and hybrid fiber loops, and packet switching capability), even to serve enterprise customers, throughout its network.[36] As a consequence, SBC still must build out those networks to bring broadband to enterprise and mass market customers alike. In so doing, as the Commission previously has acknowledged, SBC stands in the same shoes as competing carriers; both face the same economic and operational barriers to deploying new fiber infrastructure and packet switching equipment because both must purchase new fiber cables and packet switching equipment, negotiate access to rights of way, obtain permits, and hire skilled labor.[37] Indeed, CLECs actually enjoy certain advantages over ILECs, including lower labor costs (which are the largest component of construction) and state-of-the-art back office systems.[38] CLECs also may operate more efficiently insofar as they need not maintain legacy network architectures while moving to next generation packet-based networks. Moreover, even if ILECs have some advantages, which is by no means clear, CLECs cannot be impaired without access to new broadband loop plant (including fiber and hybrid loops, and packetized loop electronics) that has not yet been deployed, and which may never be deployed, if ILECs are forced to unbundle. As a consequence, any attempt to bootstrap a finding of impairment with respect to TDM-based DS1 and DS3 loops to their packetized equivalents would be unsupportable.

In any event, requiring ILECs to unbundle next generation packetized loops for enterprise customers, while eliminating unbundling for mass market customers, is nonsensical. Carriers face the same economic considerations in provisioning loops to large business customers as they do in provisioning the same loops to residential and small business customers.[39] But, the potential reward from

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[36] As discussed in SBC's Reply Comments, only a small fraction of commercial buildings are connected to SBC's fiber. SBC Reply Comments at 26, citing Keown Decl. ¶¶ 14-15 (Attach. D thereto).

[37] *Triennial Review Order* at para. 240, 275; *UNE Remand Order* at para. 306 (concluding that CLECs were not impaired without access to packet switching technology).

[38] *Triennial Review Order* at para. 240.

[39] *Id.* at para. 210.

serving large business customers is substantially greater, which is why CLECs have widely deployed fiber to serve enterprise customers.[40] There simply can be no justification for requiring ILECs to unbundle their new investment in broadband to serve the very customers CLECs are most likely to serve with their own facilities.

III. Mandatory Unbundling of Packetized Transmission Capability to Serve Enterprise Customers Would Undermine ILEC Incentives to Invest in Broadband.

Requiring ILECs to unbundle packetized DS1s and DS3s not only would run counter to longstanding Commission policy and be inconsistent with the express limits on unbundling in the Act, it also would threaten continued ILEC and CLEC investment in broadband, contrary to the goals in section 706 of the Act. The CLECs would like the Commission to believe that this issue simply is about CLEC access to DS1s and DS3s to serve enterprise customers and will not affect incentives to invest in broadband. The Commission should make no mistake, however; requiring ILECs to unbundle next generation, packetized loops for enterprise customers will directly implicate investment in broadband for ***all customers***.

CLEC claims that mandatory unbundling of packetized, broadband loops for enterprise customers would not affect ILEC investment incentives is not true even with respect to enterprise customers. As an initial matter, SBC has not yet deployed broadband facilities (including packetized fiber and hybrid fiber loops) and services to serve all enterprise customers, let alone all customers. As a consequence, SBC must invest in new fiber and hybrid fiber loops, and deploy new packet equipment to meet expanding demand for broadband services. If SBC is required to bear all the risks of and socialize any potential reward from that investment, it must think twice about whether and where to commit scarce capital resources to deploy next generation broadband networks.

But unbundling not just would reduce the potential rewards of SBC's investment in next generation packet switched networks, it also would significantly increase the cost of that investment by forcing SBC to design those networks to accommodate potential CLEC demand that may never materialize. In deploying Project Pronto, SBC spent hundreds of millions of dollars to modify the design of its next generation, hybrid fiber DLC architecture to comply with regulatory requirements to accommodate CLEC access. In the end, those funds were wasted and unrecoverable because CLECs did not avail themselves of the very access they demanded.

Requiring ILECs to unbundle packetized loops for enterprise customers; it also would directly affect deployment of broadband to serve the mass market. When SBC deploys next generation broadband facilities, it does so to reach all customers in order to achieve economies of scale and scope, and thus minimize the costs and risks associated with its broadband investment, and remain competitive with intermodal competitors. In this context, requiring SBC to unbundle those facilities, even if only to serve enterprise customers, will drive up the costs of providing broadband services to mass market customers. It also could result in premature exhaust of those facilities, as facilities and bandwidth intended to serve mass market customers, is diverted to serve enterprise customers. Mandatory unbundling of packetized loops for enterprise customers thus would undermine the business case for deploying broadband to serve all customers, including mass market customers, contrary to the goals of section 706.

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[40] *Id.* at para. 303; Verizon Comments in Support of BellSouth's Petition for Clarification and/or Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147, at 27-28 (filed Nov. 6, 2003).

IV. Conclusion.

For the foregoing reasons, irrespective of whether the Commission requires unbundling of TDM-based DS1 and DS3 loops (and, for the reasons set forth in SBC's comments and reply comments in this proceeding, the Commission should not, except perhaps in certain, limited circumstances), the Commission should not reverse its longstanding handsoff policy for broadband, and require ILECs to unbundle equivalent capacity loops using packet-based technology.

Sincerely,

/s/ Christopher M. Heimann

cc: Jeffrey Carlisle
Michelle Carey
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Federal Communications Commission

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SBC COMMUNICATIONS, INC.

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